WHO IS REGULATING THE SELF?

Self-Regulation as Outsourced Rule-Making[1]

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Introduction

Self-regulation has become the buzzword of any modern and enlightened legislator. It is generally assumed that it has become impossible to steer society from one central point. Some sixty years after Hayek[2] wrote down his doubts concerning the possibility to acquire the knowledge which is necessary for central steering and planning, legislators of welfare-states have come to agree on the wisdom of his insights. Rather than trying to do the impossible and to get a bird's eye's view of society as a whole, it is said that governments should rely on self-regulating bodies, fields or networks. Multilevel governance is the banner, delegation of powers is the practice.

Sympathetic as all this may sound, we should not be misled by terms. Self-governance or self-regulation are terms that in this context acquire a specific meaning. In multilevel governance, the pleasantly pluralist sounding prefix `multi' tends to obscure the question how these different layers and levels precisely relate and who decides on what. It is not my intention here to advocate a return to the situation in which central steering was an unquestioned practice. My aim is rather to elucidate the relations between the different levels. By investigating these relations, it will be possible to characterize the type of rules that are made by all these self-regulating bodies, and the functions they acquire in these new contexts.

In this contribution I will not analyse these relations empirically but try to relate this specific meaning of self-regulation to the style of regulation currently in vogue and practiced by both the European legislator as well as the legislators of the member-states. I will call this style goal-regulation.[3] In forms of goal-regulation rules do not prescribe specific manners by means of which goals can be obtained, but prescribe the goals themselves in a straightforward manner. Norm-addressees are required to ensure the `protection of the environment', to `improve health and safety', or to further an `innovative knowledge economy'. They are furthermore required to draft the rules and regulations necessary to obtain those ends and to report on that. The kind of self-regulation which figures in this form of goal-regulation differs

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1 I would like to thank Steven Hartkamp for his inspiring comments and insights.

2 Hayek, F.A., *Law, Legislation and Liberty: a new statement of the liberal principles of justice and political economy,* Vol. I (Rules and Order), Routledge Kegan Paul, London, 1973.

3 See for a more detailed analysis, my `Governing by Goals: Governance as a Legal Style', in: *Legisprudence: International Journal for the Study of Legislation*, Hart Publishing, 2007, pp. 51-72. and `The Emergence of New Types of Norms, in: Luc J. Wintgens (ed.) *Legislation in Context: Essays in Legisprudence*, Ashgate, Aldershot, 2007, pp. 117-133.

in a number of respects from the classical more `spontaneous' forms of self-regulation as they were identified and studied mainly in the sixties and seventies of the previous century .[4]
In section 1, I will sketch the style of goal-regulation. In section 2, I will analyse its implications for the specific concept of self-regulation that is used, in terms of the Principle-Agent (P-A) model. In the next two sections I will contrast the kinds of rules most likely to be developed by `spontaneous' self-regulation (section 3) with the kinds of rules that emerge in a goal-regulative context dominated by P-A relations (section 4). In section 5, I will touch upon organisational implications, followed by some concluding remarks in section 6.

1   Goal-regulation

In a system of goal-regulation central bodies often abstain from prescribing in a detailed manner the means and ways by which certain aims can be achieved. [5]They do not require employers to allow a lunch-break of one hour, but tell them to alleviate unnecessary work-stress.

Examples of such goal-prescriptions are the framework directives issued by the European legislator. Precise rules that indicate the manner by which certain goals can be realized are supplanted by general duties of care, indicating a certain interest, value or goal to be reached. The general duties of care that figure in these directives are imposed on private parties or public bodies alike and are owed not just to some specified others but to the world at large.

It should be noted that such general duties of care are never presented in isolation. They are always accompanied by two other requirements:
1. an *implementation norm* requiring norm addressees to devise the means and to draft the rules that are necessary to achieve the imposed aims, and
2. an *accountability norm*: the requirement to report on the measures taken, the rules drafted or, generally, the progress that is made towards the imposed goal. In the Council Directive on Health and Safety at Work[6], for instance, member-states are required to communicate the text of the provisions of national law to the Commission and to report every five years on their practical implementation. The accountability norm, therefore, requires norm addressees to prove that they complied with the first two requirements: the requirement to further a certain goal and the requirement to draft the necessary rules.

The strategy to impose goals in a direct manner is not only adopted at the European level, but is mirrored by the national legislatures. Also here, a general duty of care is formulated, although often that duty of care is more concrete than the abstract one issued at the more central level. And also here, the duty of care is accompanied by both an implementation and an accountability norm. Further down the chain, at the level where institutions or inspection

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4   Moore, S.F., "The semi-autonomous social field as an appropriate subject of study", in: *Law & Society Review* 7, 719-746, 1973.

5   Goal-regulation is sometimes referred to as discretion-based regulation. See D.G. Hawkins et. Al. Delegation under Anarchy: States, International Organizations and PA Theory. in *Delegation and Agency in International Organizations* 3, p. 7 (2005). The disadvantage of this term is that it leaves unspecified what is exactly the scope for discretion. The term `principles based regulation' as used by J. Black in her article Forms and Paradoxes of Principles Based Regulation (LSE Working Papers 13/2008) is much better, but obscures the distinction between principles and goals which is in my view fundamental and which I explored in `Het nastrevenswaardige gefixeerd', in: De grenzen van het goede leven: Rechtsgeleerde opstellen aangeboden aan Prof. Mr. A. Soeteman, Olaf Tans et al. (red.) Ars Aequi Libri, Nijmegen 2009, pp. 73-83

6   89/391/EEC, 12 June 1989

boards are confronted with these duties of care, the strategy is reproduced again. Goals are analysed in even smaller component parts and even here, lower organs are required to draft regulation and report on the progress made.

Schematically speaking, we might sketch this goal-regulative chain as follows:

1a)   Further the protection of the environment. (aspirational norm)
1b)   Make sure that you take the necessary precautions, draft the necessary legislation. (implementation norm)
1c)   Report on the progress you made. (accountability norm)

2a)   The emission of toxics should be as low as reasonably achievable.
2b)   Make sure you carry out a feasibility study, take the necessary measures, including rule-making.
2c)   Report on the progress you made.

3a)   Within two years emission of toxics should be reduced by 10%.
3b)   Inquire into the `best available techniques'.
3c)   Report on the progress you made.

At each successive stage, we see that the aim under a) acquires a more concrete shape. It specifies the *component parts* of aims (e.g. at 2a) and it specifies the *degree* in which these ingredients should be realized (see 3a). This means that at each level of norm-addressees, their rule-making activities mainly consist in two kinds of concretization: the analysis of the more abstract aim into component parts and the specification of the extent to which these component aims should be realised.

In a goal-regulative system, the term `self-regulation' is used to refer to this twofold concretisation. It is often called `conditional self-regulation'[7] in order to make clear that the self should regulate itself within an imposed frame of desirable goals and end-states. If in such a system, regulators extol the virtues of self-regulation, they simply say that they would rather like to *outsource* the business of rulemaking. If those to whom this activity is outsourced, repeat this strategy, they in turn simply outsource further rulemaking (read: concretisation) to more local levels. At each successive stage, norm addressees are told that they should engage in self-regulation.

2 Self-regulation of agents

A suitable and appropriate way to conceptualise the relations between the layers and levels that come into play in a goal-regulative chain is furnished by the model of Principals (P) and Agents (A) in which a Principal hires an Agent to perform a certain task. Goal-regulation being nothing more than a system in which rulemaking is outsourced, the P here indeed orders A to draft legislation.

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7   Eijlander, Philip and Wim Voermans, Wetgevingsleer, Tjeenk Willink, Deventer, 1999, pp. 71-75.

The paradigmatic example of a P-A relationship is that of a newly arrived visitor who hires a cab in order to bring him to the hotel.[8] The visitor, foreign to the city, is obviously utterly dependent on the cab driver's knowledge of the city plan. Unable to check whether the cab-driver is taking unnecessary and costly detours, the P has to rely on the reports of others, or on certificates, proving that the taxi company is trustworthy or other such means to make up for the intrinsic information asymmetry between P and A.

This knowledge-asymmetry is also characteristic for the relationship between parties in multi-level governance. As we have seen, this asymmetry is the very reason why central bodies are keen on outsourcing rule-making. It is assumed that local knowledge can remedy the insufficiencies of the central bird's eye view. Outsourcing rule-making, however, exposes the more central level to the risk that this knowledge is not used in order to draft the right rules, or that it is even used in order to achieve other objectives than those imposed. In order to make up for this form of uncertainty the P will ask proofs of trustworthiness. That is the *rationale* behind the duty to report: the accountability norms that pervade the goal-regulative scene.

In an important respect, however, the relationship between the more central and the more local level seems to escape from the P-A scheme. The more central level usually does not pay for these rule-making activities. The P here is simply not a paying customer but one with a gun under his coat. Institutions which refuse to make the necessary rules are often told that if they persist in their unwillingness to cooperate, they will be confronted with less benevolent regulations, issued by the central body. Euphemistically, this scheme is called `substitutive self-regulation'.[9] Substitutive self-regulation can be phrased as: `if you don't make rules, we do'.

Fortunately, the literature on the P-A model is not entirely dependent on the customer-example. A rival and more widespread *exemplar* is in use, which stresses the fact that P is always *owner*. Here P is not customer, but employer.[10] Like in the cab-driver example, there is information asymmetry, but by virtue of his ownership P has a `right' to control A which is not completely dependent on his ability to pay. Curiously enough, both the customer version and the employer version of P are used simultaneously, which is a source of confusion that pervades the entire literature on P-A relationships. Whereas any cabdriver is ready to point out to you the difference between his boss and his clients, the P-A literature is less clear on this matter. In order to analyse the goal-regulative chain in terms borrowed from the P-A model, it seems that we are more helped by the `owner' metaphor than by that of the customer simply by the fact that the P here is not paying customer..

However, by doing so, we run into a third difficulty. The owner-metaphor is namely also present in yet another usage of the P-A model, namely where it serves to analyse the relationship between the *electorate* as P and representative government as the A. Here, P is `owner' in the sense of `*sovereign*'.[11] This usage of the P-A model is widespread but, I believe, highly

8   Broadbent, Jane et al, The development of principal-agent, contracting and accountability relationships in the public sector: conceptual and cultural
     problems, in: *Critical Perspectives on Accounting*, 1996, 7, pp. 259-284.

9   Ibid.

10 See Pratt, John W. and Richard J. Zeckhauser, *Principles and Agents: the Structure of Business*, Harvard Business School Press, Boston, Mass. , 1985.

11 See Salomon. L.M. (ed.) *The Tools of Government: a Guide to the New Governance*, Oxford, U.P., 2002.

problematic. In order to clarify and defend my own usage of the P-A model it is important to identify these problems.

In my view, there is a crucial difference between the P-as-electorate on the one hand and the P-as-boss/customer on the other. If we think of customers and bosses, they both issue *specific* directions and orders as to what should be executed by the A.[12] This does not apply to the electorate. The electorate cannot be said to have identified *a specific task* that can be outsourced to the government. There is no easily identifiable goal that the citizen/voter wants to reach.[13] If we could speak of a goal or task at all it can only be described in highly abstract terms (`we the people' want you to take care of the `common good'). That means that representative government can hardly be understood as an A. It is not an agent commissioned to execute a certain well-defined task (`bring me to the hotel'; `paint that door'). Rather, it is entrusted to strike a balance between *different* competing perspectives and interests and by being representative of all the interests and values involved, the government is much more than an A. The current attempt to squeeze the traditional relationship between voter and government in a P-A model is ill-guided since it rests on the mistaken assumption that the voter has a specific objective in mind, which can be reached by expert knowledge.[14]

But although the P-A model is hardly suitable to describe and analyse traditional relationships between electorate and government, it lends itself more easily to describe the relationship in the multilevel regulatory landscape of today. The central body who outsources rulemaking has indeed a rather clear idea in mind concerning the goals and objectives that should be reached. It is true that they are more abstractly formulated at the more central levels, allowing for more scope for reasoning and deliberation than at lower levels, but the end-state that should be reached is defined. The ends that should be pursued are not left free to be determined by the A. The `self-regulating' bodies that are addressed here are real agents. They execute the tasks entrusted to them *within* the parameters proposed and according to the conditions laid out by the P. It is the P who decides on *what* should be achieved, whereas the A is asked to deliberate on *how* these can be reached.[15]

It is important to note that objectives are formulated and defined by the P, since that affects the nature of the process in which the A should account for his performance. In the traditional relationship of the citizens versus representative government, the mandate is global. It does not specify which objectives should be reached and therefore there are no fixed criteria, determined beforehand, which can be applied in an evaluation of the performance. If representative government is held accountable to the public it is only accountable in general terms and they are evaluated in no less general terms. Since governments are required to pursue the `common good', their conduct is judged in equally abstract terms. Gross breaches of trust may be reason for dismissal, not defectiveness in pursuing a definite goal.

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12 For this distinction between legislation and "managerial direction" see Lon L. Fuller, Human Interaction and the Law, in: *The Principles of Social Order*: Selected Essays of Lon L. Fuller, ed. with an introd. by K.I. Winston, Duke U.P., Durham, 1981, p. 234.

13 Although it should be conceded that citizens tend to perceive themselves more and more as customers.

14 I should add that this distinction between specific directions and global mandates is one which allows for degrees. Even the proverbial taxi-driver, summoned to reach a specific destination, should drive with due care, and with reasonable speed, which means that he also has to strike a balance between these various requirements.

15 An important part of the P-A literature is devoted to the `trade-off between (a) the cost of measuring behavior and (b) the cost of measuring outcomes and transferring risk to the agent.' See Kathleen M. Eisenhardt, `Agency-Theory: An Assessment and Review', in: Theories of Corporate Governance: The philosophical foundations of corporate governance, ed. by Thomas Clarke, pp. 78-92, at p. 82.

This does not apply to the system of goal-regulation which is in use in multi-level governance. There, the central levels behave much more like the paradigmatic taxi customers and employers: they specify objectives and targets to be reached. This facilitates the formulation of criteria that should be met in order to judge whether the objectives are met. That is why parties in multilevel governance can without difficulty be understood and analysed as P's and A's.

The only thing we have to keep in mind is that P and A are relational terms. As such, the relations between P and A can be reversed, as can be seen in the regulative chain depicted above. The agent A that figures at stage 1 turns into principal P at stage 2. The A addressed at 2 is the P of stage 3. Each A will become a P in the successive stage. Each level of concretisation as indicated above marks a metamorphosis of an A into a P. Throughout the entire system it is the A who executes the plans of P and accounts to P for what has been achieved.

3   Rules for nurses who nurse

It is important to note that the fact that self-regulation is required and commissioned by a P adds two more tasks to be fulfilled by the A. It is not enough that the A
1. carries out the tasks for which it was instituted (to teach or to nurse) and
2. makes rules in order to perform these tasks.
But furthermore, the A is commissioned to
3. promote the aims imposed by P (`excellent education' and `good health care')
4. draft rules or take measures in order to attain those goals
5. report on the progress that was made.
In order to understand the difference between the first set of tasks (1 and 2) and the second set (3-5) let us first analyse the tasks performed by a group of professionals which sets out to make rules (2) in order to carry out their daily work (1). Here, self-regulation can be called more or less `spontaneous', i.e. not required by a P. In the next section I will proceed by discussing the additional tasks 3 to 5 that have to be performed if self-regulation is commissioned by a P. At the end of next section I will argue that the rules that are developed in spontaneous self-regulation (2) are different from those developed as a response to P (4) since they acquire a different function

Which kinds of rules are likely to be developed by those who actually carry out the work, for instance nurses, in order to do what they are supposed to be doing: nursing? I propose to carry out a small thought-experiment. What kind of rules would a simple group of nurses develop who are working together in a hospital ward? In this –admittedly- idealtypical situation, we may distinguish five kinds of rules.

a) The first of these are *coordinative* rules. The nurses should know when they are assumed to bring patients to the X-ray department, when the doctor will pay his visit, at which times the family is permitted to visit, they should know the lunch hours of the haematology dept. And so on. Without a minimum of coordination, work is impossible.

b) But not only do nurses want to know *when* they are to perform certain acts; they also want to know *what* they should do. It is possible to act without rules and to act on the basis of insight, experience or intuition but in order to reduce the risk of mistakes made by people

without great insight or of short experience, it is helpful to have rules and protocols at one's disposal in order to decide on the kind of medical treatment that should be given to a patient who exhibits such and such symptoms. These are *heuristic* rules. In any organisation such rules of the thumb pertaining to the craft itself can be found.

c) A third variety of rules that would be convenient are rules that serve to distribute and allocate time, energy, benefits, funds, and the like. They serve the *allocation* of (scarce) resources and enable both the way nurses deal with the patients (`which patient do I treat first') as well as how they distribute scarce resources amongst themselves. Without such allocation-rules, work is still possible, but again, deliberation on a case to case basis would be inefficient and cumbersome.

d) A fourth variety would refer to how the ward would look like. These rules refer to how clean the kitchen should be, the technical facilities that should be present, the way the ward is furnished and the like. These rules do not tell anyone *how to act* but specify how the surrounding workplace should look like. I will call these rules *stage-setting* rules. Of all four varieties stage-setting rules are the least indispensable. There are many hospitals around the world which are genuine hospitals but that do not in the least exhibit the characteristics that are required by these rules. However, if we are to imagine what would happen in a ward without stage-setting rules, we would probably come across some nurse suggesting rules as to the minimum features of what should look a decent hospital, just in order to improve efficiency of the work that has to be done in such a ward.

e) Finally, if the group of nurses is big enough and has to deal with newcomers, pupils and strangers, a type of rules would be developed that is similar to what Hart called *secondary rules*: rules that stipulate who is competent to make and change rules if necessary and to solve conflicts and how those tasks should be executed.[16]

All five varieties of rules (coordinative, heuristic, allocative, stage-setting and secondary rules,) would be developed by this fictitious group of nurses in order to facilitate the work they are doing. It should be noted that these rules are not primarily meant to advance a certain interest or aim, although, if asked, nurses would acknowledge that the possibility of doing their job well implies that better health care is provided. But the rules are not *devised* in order to advance such aims. They are primarily meant to guide and coordinate behaviour, and to cut short deliberation on a case to case basis for reasons of efficiency.

A further characteristic of these rules is that most of them would probably go unnoticed. They are developed in an implicit way, as a result of working together for some time. Their existence is only noticed in case they are violated.

Furthermore, it should be noted that there is only a need to make these rules explicit in sofar as they are used as a common point of reference, a shared standard, that should be transmitted to newcomers in order to serve as a reason to question and to criticise people's conduct, or as a reason to be advanced in order to justify one's behaviour. (As a result, the allocative rules will

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16 Hart, H.L.A., *The Concept of Law*, (Second Edition, with a Postscript edited by Penelope A. Bulloch and Joseph Raz) Oxford University Press, 1997 (orig. 1961).

probably be the first to be made explicit). It is not for the sake of explicitness itself that rules are made explicit, but merely because they can only serve as workable normative standards for criticism and justification if they are reasonably explicit. I say `reasonably' because such a justification need not be exhaustive. If asked by patients why they have to wait so long for their breakfast, it suffices to explicitize the rule that room 1 comes before room 2 but it is not always necessary to justify the choice of the rule that patients are to be treated according to the room they are in.

Finally, it should be noted that the five varieties just mentioned are all functional in the sense that someone is to *gain* by the rule.

ad a) In the case of coordinative rules, this advantage is clear. My freedom of action is obviously constrained by the rule that I have to be there at 7 PM, but the freedom of others with whom I deal is thereby enhanced. They are absolved from the need to wait for me interminably and can plan the rest of their day accordingly.

ad b) In the case of technical rules of the thumb, the advantage should mainly be sought in the time- and energy-saving nature of rules, which absolve me from the task of weighing all relevant pros and cons for and against a certain action. [17]

ad c) The virtues of allocative rules are manifold. They serve to make life predictable and to minimize arbitrary exercise of power, they may enhance the legitimacy of the resulting distribution, while excluding favoritism and privilege. Whereas the virtues of allocative rules seem somehow intrinsic to them being rules at all (*any* allocative rule is better than no rule at all) this is not the case with

ad d) stage-setting rules, which somehow seem to depend more on their content and the balance between the benefits and burdens they impose. Clean hospital-floors may be in the interest of all, but the requirement that there should be a distance of 80 cm between two hospital-beds is already further removed from evident public interest and as such tends to become perceived as unnecessarily restrictive. Nurses who devise stage-setting rules will probably be keen on selecting only those which facilitate their job.

ad e) The secondary power-conferring rules, finally, are more evidently useful for the reasons adduced by Hart: without secondary rules which regulate how the other rules should operate, the potential virtues of these other rules are endangered.

Summarizing, if nurses would be left to regulate themselves, they would probably come up with rules that enable them to coordinate actions, to make their job easier and more efficient, that enable them to solve conflicts over resources and which are only made explicit if they are used as common standards facilitating justification and criticism. All these rules have a constraining as well as a liberating side to them.

4   Rules to advance P's aims

In the context of multi-level goal-regulation, we have seen, however, that the image of self-regulation as rule-making by e.g. professionals in order to facilitate the execution of their job, is too simple. The norm-addressee is not only asked to do his job, but also to promote certain aims, to draft rules and to report on what has been done. So let me now proceed and

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17 Raz, Joseph, *The Authority of Law: Essays on Law and Morality*, Oxford U.P., 1979 and *Practical Reason and Norms*, Princeton, 1990 (orig. 1975).

investigate the kind of rules developed in answer to these additional requirements: the duty to achieve the aims imposed by P and the duty to report on the progress made.

If we return to our fictitious group of nurses, it is easy to see that faced with these additional requirements, they will for a large part draw on the body of rules that were already developed over the years. However, since these rules should be presented in a report to outsiders (the P) and since, moreover, they should clearly be presented as advancing the desired aims proposed by P, they should be translated and modified. The duty to achieve aims and to report on the progress made, gives rise to three requirements that should be met by the rules at hand.

- First of all, in order to be presented in a report, the rules should be made explicit. Rules of the thumb should be formalised into elaborate protocols, that are analysed to such an extent that they can be followed step by step.
- Second, it should be shown that these rules advance the imposed aim. There should be a clear link between the rules and the aim.
- Third, it should be shown that the rules are followed. The P is not satisfied with dead letters. That implies that not only a set of rules should be presented but also compliance rates. This furthermore implies that rules should require a performance that is demonstrable and controllable.

It is not easy to meet these additional requirements. In fact, in order to establish a clear and demonstrable link between rule and aims, one will probably be compelled to work from both ends. At the one end, aims should be analysed and concretised into workable units. At the other end, rules should be adjusted so as to fulfill their new tasks. In fact, this is exactly the picture that emerges if we study more closely the kind of tasks undertaken in a goal-regulative landscape.

* Analysis of aims:

In order to make the abstract aims workable, they should be concretised and specified. Some will try to specify good health care by subdividing the aim into a number of desiderata to be met: short waiting times, adequate information, permanent assistance of qualified nurses, and so on. Others will busy themselves with the question how short a short waiting-time is; and how adequate the information that should be provided. They will feel the need to compare their own performance with that of other comparable units and wards. Both forms of concretisation of aims are accompanied by the need to make compliance controllable. This leads to an analysis of aims and targets into preferably tangible and measurable units of performance that can serve as criteria for the evaluation of achievements.

The rules that are derived from such analysis of aims are mainly imperatives that specify the targets to be reached. They are of the type: `by the year x waiting-times should be reduced by y %'. They specify what should be reached, but not how that should be done. They are not action-guiding rules, but rules that are very similar to what I called stage-setting rules: rules prescribing the *situation* that should be reached.

It should be noted, that all those engaged, however, in concretising the proposed aim and specifying this aim into targets to be reached will be compelled to adopt an *outsider*'s perspective to one's job and ask themselves the question: what is it what we are aiming for?

While they are thus deliberating on the aim of good health care, the personnel of a given hospital or ward (to stick with this example) are confronted with other goals as well. Good labour-conditions is a case in point. Or the obligation to protect the environment. Also these aims should be concretised; and levels should be ascertained below which a certain performance is deemed unacceptable. To that effect special committees and commissions will probably be established, each devoted to the aim at hand and busy with the development of performance indicators.[18]

The enormous energy that goes into specifying aims and targets is hardly compensated for by any gain. Partly, this is due to the nature of such target-rules. They are a special variety of what I called stage-setting rules. We already noted that the advantage of stage-setting rules is dependent on their content. They are not intrinsically beneficial, such as allocative rules, which may be preferred above case-to-case reasoning in virtue of the fact that they are rules. This also applies to the target-rules that are developed in the process of goal-specification. A lack of target-rules does not render life unbearable or capricious or arbitrary. All one can say is that without target-rules, people are more easily satisfied with their own performance. Without target-rules, jobs are performed but without the zeal to aspire to higher levels of excellence.

Such lack of ambition may be deplored but should be offset against the burdens this new form of rule-making impose. Whereas the five types of rules discerned in the previous section to a large extent remove the inefficiency of case-oriented decision-making, these rules do exactly the reverse: they invite to engage in continuous deliberation. The ongoing reflection on the goals-to-be-reached may even cost more time and energy than deciding cases on their own merits.

* Adjustment of rules:
But not only new rules will be developed; also existing rules will be presented to the P in order to show that P's aims are taken care of. Some of the existing rules lend themselves more easily to fulfill the three above-mentioned requirements than others. As is to be expected, *stage-setting rules* almost perfectly fit the job. The aim of good health care can be analysed as comprising `hygienic surroundings' and all the rules pertaining to hygiene can be said to be conducive to hygiene and therefore to good health care. Compliance rates can be proved by inventing schemes of internal quality assessment and control. In fact, the rules pertaining to such control-systems are in themselves stage-setting rules: they prescribe a situation to be reached.

It should be noted that such stage-setting rules will be more abundant in a goal-regulative system than in `spontaneous' self-regulation. We saw that in the simple setting of nurses working together, stage-setting rules will be selected in view of their usefulness in everyday life. But in a P-A context, they acquire a different function. They are presented to show that the imposed aims are to some extent realized. Here, these rules will not be judged to the extent they facilitate work, but in view of their usefulness as justificatory tool. Since the assessment of progress takes place by means of bench-marking, stage-setting rules tend to be uniformly imposed and adopted, regardless of the special features of the local context.

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18 A.R. Mackor, *Te meten, of niet te meten: dat is de vraag* (oratie Rijksuniversiteit Groningen). Amsterdam: SWP, 2006

Heuristical rules, the rules that give information about how to execute the craft itself, can also be used. But again, in the new context of rules for the P they acquire an additional function. They are not merely useful devices in order to know and to discover some recommendable strategies to be used in the diagnosis and treatment of patients. The mere existence of the heuristical rules in itself will now serve as proof that the aim of the P has been taken seriously and has been aspired to. In order to be useful as such a justificatory tool the rules of the craft have to be explicitised and formalised in protocols.[19] And since the absence of such protocol increases liability in case of accidents, these protocols have to be standardized as well.

What about *coordinative rules*; the rules which are genuinely indispensible in any daily context? Here, a problem arises. We have seen above that coordinative rules do not owe their usefulness to their content. They are advantageous because they are *rules*. Their content-independence is obvious from the paradigmatic example of coordinative rules: traffic rules. Whether one drives on the right or on the left is indifferent. What counts is only that there is *a* rule to that effect. This feature of coordinative rules makes them ill-fitted to figure as proofs to the P that they help to further the imposed aim. The problem is simply this: there is no direct link between rules of coordination and the aims to be advanced. The only way they can be presented in the annual report is that there is *some* scheme of coordination. In this respect they play a poorer role than heuristical and stage-setting rules. Heuristical rules are not useful just because they are rules, but they owe their merits to their content. Only those heuristic rules that are ultimately based on sufficient scientific evidence are able to advance the aim of good health care. The same applies to stage-setting rules. We already remarked that their usefulness depends on their content. The cleanliness of kitchen floors can be directly linked to the aim of good health care. All this cannot be said to coordinative rules. They do not owe their value to their content.[20]

Allocative and secondary rules are in the same bag as coordinative rules. Their virtues are mainly -though not exclusively- to be sought in their being rules. That means that their justificatory role -at least to the outside world- is limited, compared to heuristical and stage-setting rules. Although any health inspector knows that rules which confer competences, regulate the internal organisation of a ward or its internal distribution of burdens and benefits, are generally useful, and that their existence is usually a good sign, signaling an efficient or orderly hospital, it is not the *content* but the *mere existence* of these rules which alone can count as an argument in the annual report. It is enough to point out that there is *some* scheme for cooperation or for allocation. That means that the existence of documents containing codes, protocols and the like is presented as proof in itself. The content of these documents is less relevant. They are not the topic of extensive debate in the various committees who have to show that they made progress towards the desired aims. Whereas hours can be spent on determining the targets to be reached, the amounts of patients to be treated, the length of waiting hours or the amount of knee-operations, the rules that *keep the organisation going* are much less intensely

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19 Berg, Marc, *Rationalizing Medical Work: Decision Support Techniques and Medical Practices,* diss. Rijksuniversiteit Limburg, 1995 and `Problems and Promises of the Protocol', in: *Soc.Sci.Med.* 1997, Vol. 44, No 8, pp. 1081-1088.

20 We should keep in mind, however, that content-independence is a quality that can be realized by degrees. Traffic-rules are to a large extent content-independent –they are indifferent as to whether one drives on the right or on the left side, but not completely so. It is still unwise to allow cars to drive in the middle. See also Schauer, F. , *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life,* Clarendon Press, Oxford, 1991.

debated. Their existence is merely taken for granted as long there is some written document. And the rule that requires such a document is in itself, again, a stage-setting rule.

The context in which rules operate is therefore crucial. If they operate in the context of accounting to P, the rules lose the function they had for A. They lose their heuristical or coordinative powers and turn into justificatory tools. However, we should note that although they are perceived and presented by A as mere justificatory tools, they probably have a different function for P. For P they do not serve as justificatory tools. Rather, the P relies on the existence of such rules as helpful tools that help *him* decide whether the A is reliable, has reached P's objectives, etc. So, it may be possible that one and the same rule changes function three times. The rule to regularly turn patients in their beds may originate as a heuristical rule for a nurse to prevent the patient from incurring decubitus. The same rule may be formalized (`the patient should be turned around 4 times a day at regular intervals') and presented as a sign that the hospital is well-organised, in which case the rule is turned into a justificatory tool for the A. But in becoming such a tool, it acquires again the function of a heuristical rule for the P, who relies on the existence of such rules in his effort to assess the quality of the health-care provided by that hospital.

It should be noted that the degree of content-independence can change as well during the time-span of such a rule. As heuristical rule for the A the rule was mainly valuable for its content and its importance is assessed to the degree it helps the A to prevent decubitus. As a justificatory tool, it gains content-independence. Its mere existence is presented as a sign that the hospital is well-run. It retains that content-independence in the eyes of the P, since it is for the P not a rule that is valuable for its content (the content is not directly linked to *his* aim, viz. assessing the quality of the institution).

But also the reverse can happen. Let us suppose the existence of a coordinative rule stipulating that visitors should be allowed from 16-20 hrs. The content of that rule was indifferent to the nurses (it could have been from 9-13 as far as they were concerned). However, in the annual report the rule is presented as a sign that the hospital takes seriously the interests of working family-members and is thereby directly linked to one of the aims of the hospital (to be customer-friendly). It loses content-independence. Finally, it depends on the aims of the P whether the rule succeeds in retaining that content-dependence or not. In case it is the P's aim to foster customer-friendliness, the rule will remain content-dependent, otherwise it will lose that quality and its mere existence will suffice to do the job.

It is tempting to draw the conclusion that the rules that are developed in response to P's orders are only marginally -or at best partly- effective in the context of daily work. And the rules that implicitly play an important role in everyday life can only marginally -or at best partly- be referred to in the official reports. Two normative realities seem to exist next to each other.

5   Self-regulation by outsiders

Self-regulation as outsourced legislation seems to produce a different kind of rules than the `spontaneous'self-regulation that took place in our fictitious group of nurses. And to the ex-

tent the same rules are presented, they are coloured and selected in view of the new and different function they acquire.

In the previous section I assumed that the mere necessity of adjusting rules to ends implies an outsider's perspective. Nurses who are confronted with goals are wondering: what is it we strive after? The activity of pondering about ends and ways to achieve these ends implies by itself the adoption of an external point of view. I think that this is one of the reasons (but only one of them!) that those who gradually take on such managerial tasks as developing targets and formulating performance-indicators almost imperceptibly -usually even unwillingly- move to the fringes of the professional body. Those who *contemplate* an activity rather than carrying it out. The normative space that is created in the various committees and commissions that are established in order to meet the increasing burdens of rulemaking and reporting does the rest. The rules developed there only partly covers the reality of everyday life. And they only partly meet the needs of those they are meant to regulate. They meet the requirements of the P, perhaps, but not those of the regulating `self', the A.

In the meanwhile, we have seen that the rulemaking and reporting bodies that have been established need to be able to compare standards as well as achievements to those of comparable others. In order to compare and to assess the extent to which hospital A performs better than hospital B, the stage-setting and heuristical rules that play such an important role in the context of P-A relationships, should be standardized. This further implies the need for all sorts of consultation with other comparable boards, committees and commissions. A new network is gradually established of people who from now on have acquired another profession: that of delegated lawmakers, bench-markers, reporters and auditers.[21] Depending on the field at hand, these people are either professional managers recruited from without the profession or they are originally professionals who have taken on administrative tasks and gradually evolved into managers and administrators. In many instances, companies and institutions merged into greater units in order to cope with the administrative burdens imposed on them. And finally, a lot of this rule-drafting work is carried out by branche-organisations who act as representatives of the field and as sparring partners for the P. The A is therefore often a multi-layered whole itself, consisting of professionals, representatives of professionals, professionals turned into representatives or fulltime administrators. The `self' of the A only exists as a simple whole in the eyes of the P. In reality the A consist for a large part of people whose job it has become to adopt an outsider's point of view in drafting `policies'. It should be noted that some of these new outsiders are at the same time helpful in formulating the goals of P. In both official and unofficial ways, as reliable experts, consultants, etc. they can be involved in formulating's P's policies. So neither the A nor the P are simple entities, but both are in reality composite and complex wholes.

Keeping in mind the fact that the new layers of intermediate rulemakers, administrators, and reporters live in a different reality and a different normative space than those who they profess to represent, it can be expected that they in turn will feel the need to coordinate their actions, to invent rules of the craft, to allocate among themselves funds and resources and to regulate competences and powers. In other words; as a new professional group, carrying out tasks of `their own' so to speak, they will feel the need to spontaneous self-regulation,

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21 Power, Michael, The Audit Society: Rituals of Verification, Oxford U.P., 1997.

in just the same way as our fictitious group of nurses did in *their* work. As such they will live in two realities: in their reality as administrators they adopt an external point of view. As professional rule-makers, however, they are forming a new `in'group, developing rules of their own. Until, of course, these latter rules are in turn transformed into justificatory tools for representation to an outside P., for instance when more central bodies call for regulations regulating the regulators. It is a dazzling -but, I fear, not an unrealistic- thought.

6   Conclusion

In this article I have tried to show that the cry for `self-regulation' as a means to relieve the burden of rulemaking from the shoulders of central legislators should not be understood as a mandate to norm-addressees to regulate themselves. Rather, the relation between legislator and norm-addressee can be analysed as one between a principal and an agent, in which P outsources the task of rule-making to A. The A should draft its rules and laws, not for its own sake, but in order to achieve the aims aspired to by the principal. In order to control whether A fulfills that job adequately, the A has to report on the rules it drafted and the progress it made towards the imposed aims.

In order to meet these requirements, the A has to analyse the imposed aims into workable units that can function as targets to be reached. For the rest, it can rely on a body of rules that already had been developed as a response to the needs of everyday life. However, the different kinds of rules that were already developed and followed acquire a different function here. They are now mainly presented as justificatory tools. This implies they have to be transformed. Most of them will be modeled as so-called stage-setting rules, that have a firm connection to the imposed goals.

In general, those rules that can be represented as directly linked to underlying goals are pre-ferred above rules where such a link is less evident, and which are mainly useful in virtue of their being rules. The criteria that distinguish useful from useless rules are not whether they facilitate working and living together, but to which extent they are capable of justifying per-formances in the light of P's aims. This means that the burdens that are imposed by such rules on those whose activities are governed, are not compensated for by benefits. They constrain but do not liberate. The `self' that is governed, is in fact governed by a groups of professionals who live in a different (normative) reality and have different criteria, since they are mainly accountable to the P who commissions them to make rules in order to achieve P's own aims.

This state of affairs threatens to undermine the very foundations of goal-regulation itself. I noted above that the leading assumption in a system in which rulemaking is outsourced, is that norm-addressees can be trusted to devise their own means in order to achieve P's aims. But of course, that liberty is in reality quite modest. If a hospital claims to advance health by an intensive practice of spiritual healing, this implementation will not be welcomed warmly. Goal-regulation is only possible in a world in which a certain level of performance is already realized and in which some (professional) values and practices are widely shared. In a situ-ation in which these values and practices need to be presented as justificatory proofs that P's aims are realized, they risk to lose these important functions.